34/2013

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act No. 15 of 979 as amended.

Pannila Gamage Roshan Sampath Kumara

Accused-Appellant

C.A.Case No:-34/2013

H.C. Matara Case No:-36/2009

V.

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

Before:- H.N.J.Perera, J. &

K.K.Wickremasinghe,J.

Counsel:-Anil Silva P.C. for the Accused-Appellant

Shavindra Fernando A.S.G. for the Respondent

Argued On:-04.03.2015/13.03.2015

Written Submissions:-28.04.2015

Decided On:-23.06.2015

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Matara for committing the murder of one Ranjith Rubersinghe on 23.03.2003 punishable under section 296 of the Penal Code. After trial without a Jury the learned High Court Judge convicted the accused-appellant and imposed the death sentence on 23.01.2013. Being aggrieved of the conviction and sentence, the accused-appellant had preferred this appeal to this court.

The prosecution case rests solely and squarely on circumstantial evidence. Prosecution relied on the following evidence to support the conviction.

(a)Confession and threat made by the accused-appellant to witness Karunaratne, soon after the incident, at which point the accused-appellant was armed with an axe.

(b)The confession and threat made by the accused-appellant to

Witness Malini Abeysekera.

(c)The evidence of motive and previous animosity between the

Accused-appellant and the deceased.

(d)The subsequent conduct of the accused-appellant i.e absconding

From the village for nearly one month soon after the incident.

(e)Medical evidence

(F)The failure of the accused-appellant to give a reasonable

explanation in his dock statement.

According to the prosecution witness Karunaratne, the deceased Rubersinghe alias Patta was married to one Srima Damayanthi (a daughter from his wife's first marriage) and was residing in a separate house in the same land occupied by the said witness. On 23.03.2003 at about 4.15 p.m. He had met the deceased at witness Malini's residence. He too had gone to Malini's residence to consume alcohol. On being informed that there is no one at home, the deceased had left Malini's residence and gone home. Thereafter witness Karunaratne had left the place with Suresh and Jayasena and on his way home he has met the accused-appellant coming towards him with an axe in his hand. The accused-appellant had pointed the axe, scolded in filth and threatened him not to give evidence and further stated that" I have finished your son-in-law". The witness Karunaratne has further stated that it was around 6.20-6.25 in the evening and that there was ample light to recognize the accused-appellant. The accused-appellant had thereafter run towards the house of witness Malini and witness Karunaratne proceeding further has come across the deceased who was lying near the house of Chuti Mahaththaya. He tried to speak to the deceased but found him dead at the time.

The witness Malini too had stated in her evidence that on the same day at about 6.30-7.00 she saw the accused-appellant passing her house and going down the lane. She has further said that she felt that he carried something in his hand but could not make out what it was. But she has clearly stated that she saw the accused-appellant and was able to recognize him and also recognized him from his voice. She very clearly stated to court that the accused-appellant passed her house around 6.30-700 p.m and went down the lane stating "Killed Patta- do not give evidence." The accused-appellant is well known to the said two witnesses. There is no doubt that they have clearly recognized the accused –appellant as the person who stated that he had killed patta and

not to give evidence. In my view the two witnesses Karunaratne and Malini had clearly identified the accused –appellant as the person who uttered the words 'killed Patta- do not give evidence" beyond reasonable doubt.

Witness Karunaratne has stated that the accused-appellant and the deceased were not in good terms. There had been a quarrel between them about 7-8 months prior to the said incident. The wife of the deceased witness Srima Damayanthi too has testified to the fact that there was animosity between the deceased and the accused-appellant. Both witnesses Karunartne and Malini had very specifically stated that the accused-appellant said that he has killed the deceased and not to give evidence. Witness Karunaratne has also seen the accused-appellant carrying an axe in his hand and coming from the direction from where the deceased was found fallen with cut injuries.

The doctor who held the post mortem had referred to a cut injury above the neck of the deceased. 7 cm in length, due to which the tissues of the brain too were injured. The doctor has classified the said injuries as fatal injuries and has stated in his evidence that a person who receives this type of injuries cannot survive even for one minute.

It is well settled law that when the conviction is solely based on circumstantial evidence prosecution must prove that no one else but the accused committed the offence.

In Podisinghe V. King 53 N.L.R49, it was held that in the case of circumstantial evidence it is the duty of the trial Judge to tell the Jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt.

In Don Sunny V. The Attorney General 1998 (2) S.L.R 1, it was held that the charges sought to be proved by circumstantial evidence the items of

circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

The fact that the accused had the opportunity to commit the said murder is not sufficient. The prosecution must prove that the act was done by the accused alone and must exclude the possibility of the act done by some other person. In the case of The Queen V. Kularatne 71 N.L.R N.L.R 534, the Court of Criminal Appeal quoted with approval the dictum of Whitemeyer, J. in Rex V. Blom as follows:-

"Two cardinal rules of logic governs the use of circumstantial evidence in the criminal trial:-

(1)The inference sought to be drawn must be consistent with all the Approved facts. If it does not, then the inference cannot be drawn.

(2)The proof of facts should be such that they exclude every reasonable Inference from them, save the one to be drawn. If they had not excluded the other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

There is no direct evidence in this case. The items of evidence relied by the prosecution is purely circumstantial. Consideration of circumstantial evidence has been vividly described by Pollock C.B. in Regina V. Exall [1866] 4 F & F 922 at page 929, cited in King V. Guneratne [1946] 47 N.L.R 145 at page 149 in the following words:-

"It has been said that circumstantial evidence is to be considered as a chain, and each piece as a link in the chain, but that is not so, for then, if any one link breaks, the chain would fall. It is more like the case of a rope comprised of several chords. One strand of the rope might be insufficient to sustain the weight, but three strands together may be quire of sufficient strength. Thus it may be in circumstantial evidence- there may

be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit."

The items of circumstantial evidence referred to earlier in this case in my opinion is sufficient to sustain the weight of the rope. Further totality of the evidence led in this case does lead to an inescapable and irresistible inference and conclusion that it was the accused-appellant who inflicted injuries on the deceased.

It is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt. Kathubdeen V. Republic of Sri Lanka [1998] 3 Sri L.R. 107.

The accused-appellant has given evidence from the dock and the learned trial Judge has held that the dock statement has not created any doubt in the prosecution case. The accused-appellant has only denied the charge against him and said that he had no animosity with deceased. I have perused the dock statement which is a very brief one running into few lines – to be exact three lines. There is hardly any evidence in the dock statement to evaluate. It amounts only to a bare denial of the allegation levelled against him by the prosecution. In my view that the learned trial Judge has correctly rejected the dock statement of the accused-appellant. The dock statement is not credible and nor does it create any doubt on the prosecution case.

On perusal of the judgment of the learned trial Judge it is very clear that the learned trial Judge had considered all the material evidence that had been led before him at the trial by both parties. A Court of Appeal will not lightly disturb the finding of a trial Judge with regard to the

acceptance or rejection of testimony of a witness unless it is manifestly wrong. The Privy Council in Fradd V. Brown & Company Ltd. 20 N.L.R, at page 282 held as follows:-

"It is rare that a decision of a judge so express, so explicit upon a point of fact purely is over ruled by a Court of Appeal, because the Courts of Appeals recognize the priceless advantage which a judge of first instance has in matters of that kind, as contrasted with any judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will over-rule a judge of first instance."

In conclusion, for these reasons stated above I hold that the accused-appellant had failed to satisfy this court on any ground urged on his behalf that a miscarriage of justice had occurred. Therefore I dismiss the appeal of the accused-appellant and affirm the conviction and sentence dated 23.01.2013 of the High Court Judge of Matara.

JUDGE OF THE COURT OF APPEAL

K.K.WICKREMASINGHE

I agree.

JUDGE OF THE COURT OF APPEAL